Supreme Court, U.S.
FILED

98 1512 MAR 22 1999

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No. _____

In the
Supreme Court of the United States
October Term, 1998

SANTA MONICA BEACH, LTD.,
Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent.

SANTA MONICA RENT CONTROL BOARD,
Real Party in Interest.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A landlord in Santa Monica, California, filed an inverse condemnation action alleging that the application of that city's rent control law effected a regulatory taking of his property by failing to substantially advance legitimate state interests. The California Supreme Court ruled that an inverse condemnation claim could not be stated by allegations that the application of Santa Monica's rent control law had reduced the city's stock of affordable housing and imposed especially harsh impacts on the poor, the elderly, and young families, whom the law was expressly designed to protect. This raises the following questions for review by this Court:

1. Should the ends-means nexus test of *Nollan v. California Coastal Commission* be used to determine whether a rent control law effects a regulatory taking as applied to specific real property?

2. Is a claim for an as-applied regulatory taking properly set forth by factual allegations which, if proven at trial, would show that the application of a rent control ordinance has "no relationship at all" to its admittedly legitimate police power objectives?

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Petitioner Santa Monica Beach, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court, entered in the above-entitled proceeding on January 4, 1999.

OPINIONS BELOW

The decision of the Supreme Court of the State of California is reported as *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 81 Cal. Rptr. 2d 93 (1999), and is reproduced as Appendix (App.) A to this petition. The decision of the California Court of Appeal, Second Appellate District, was previously reported as *Santa Monica Beach, Ltd. v. Superior Court*, 42 Cal. App. 4th 1228 (1996), and is reproduced as Appendix B. The Order Sustaining Defendant's Demurrer entered by the Los Angeles County Superior Court in *Santa Monica Beach, Ltd. v. Santa Monica Rent Control Board* is unreported and is reproduced as Appendix C. Page references are to the versions in the appendices.

JURISDICTION

The opinion of the California Supreme Court that is the subject of this petition was filed and entered on January 4, 1999. App. A. The California Supreme Court considered and decided the question of whether allegations that Santa Monica's rent control ordinance failed to substantially advance legitimate state interests as applied to Petitioner supported a claim for an uncompensated regulatory taking of Petitioner's property in violation of the Fifth and Fourteenth Amendments to the United States Constitution. This petition for writ of certiorari has been timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part, "private property [shall not] be taken for public use, without just compensation."

Santa Monica City Charter Article XVIII, Section 1800, *et seq.* (the Rent Control Law), imposes rent control on privately owned residential rental property in Santa Monica, purportedly to protect and increase the city's supply of affordable housing and to promote the welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens. The full text of the Rent Control Law is reproduced at Appendix F.

STATEMENT OF THE CASE

A. Santa Monica's Rent Control Law

In April, 1979, the City of Santa Monica adopted City Charter Article XVIII, Section 1800, *et seq.* Among other things, the Rent Control Law requires that owners of residential rental property register each rental unit and pay annual registration fees to the Rent Control Board, establishes maximum allowable rents, and prohibits evictions except for specified reasons. The Rent Control Law's statement of purpose is set forth as follows:

> A growing shortage of housing units resulting in a low vacancy rate and rapidly rising rents exploiting this shortage constitute a serious housing problem affecting the lives of a substantial portion of those Santa Monica residents who reside in residential housing. In addition, speculation in the purchase and sale of existing residential housing units results in further rent increases. *These conditions endanger the public health and welfare of Santa Monica tenants, especially the poor, minorities, students, young families, and senior citizens.* The purpose of this

> article, therefore, is to alleviate the hardship caused by this serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return.
>
> Through this Article, the city exercises its police power in order to address the serious housing problem recognized in the original enactment of this Rent Control Law in 1979 and still existing in 1984. The 1984 Amendment to the Rent Control Law is . . . intended to enable the Board to provide relief to persons facing particular hardship and to protect and increase the supply of affordable housing in the city. Termination or erosion of the protections of this Article would have serious disruptive consequences for persons in need of protection and the supply of affordable housing in the city.

App. F-1-2 (emphasis added).

The facial validity of the Rent Ordinance is not at issue in this litigation, nor does Petitioner question that providing assistance to the poor, minorities, students, young families, and senior citizens is a legitimate interest of government.

B. The Rent Control Law Is Applied to Santa Monica Beach's Property

Petitioner Santa Monica Beach, Ltd. (SMB), owns a 12-unit apartment building in the City of Santa Monica that is subject to the Rent Control Law. In 1992 and again in 1993, SMB filed petitions with the Rent Board seeking rent adjustments sufficient to assure it a fair return on certain investments in capital improvements. These petitions were denied in whole or in part by the Rent Board's hearing examiner, whose determinations were affirmed by the Rent Board on appeal.

C. SMB Files Suit for a Regulatory Taking, Alleging That the Application of the Rent Control Law to its Property Fails to Substantially Advance Legitimate State Interests

SMB filed this lawsuit in March, 1994, alleging that the Rent Board's actions comprised a regulatory taking by failing to substantially advance legitimate state interests. That same year, California adopted unique procedural requirements for pursuing regulatory taking claims. *See Hensler v. City of Glendale*, 8 Cal. 4th 1, 9-21 (1994). In compliance with these requirements, in 1995 SMB joined a petition for administrative mandamus (seeking invalidation of the Rent Board's decision) with its complaint for inverse condemnation (seeking just compensation under the Fifth Amendment).

The core of SMB's complaint consisted of allegations that, as a factual matter, the Rent Board's application of the Rent Control Law had failed to advance--and in fact had substantially *impeded*--the legitimate policy objectives of the law. Specifically, SMB alleged that between 1980 and 1990, during which time the City's rent control law was continuously in effect:

- the City's stock of rental housing units declined by nearly 5% and the City experienced a loss of 775 low-income rental units notwithstanding that, during the same period, the rental housing supply and the number of low-income rental units *increased* in all comparable Southern California cities without rent control (App. E-3);
- during this time Santa Monica also lost 285 "very low-income" rental units, evidencing the largest exodus of economically disadvantaged renters from any comparable Southern California city (*id.*);
- under the City's administration of the Rent Control Law, rental housing in Santa Monica had become "increasingly unavailable" to young families, with the number of

family households with children declining by 6% during a period when no comparable non-rent-controlled Southern California city lost young family households (App. E-4);

- the impact of the Rent Control Law was especially harsh on young families headed by a mother with no spouse. The number of female-headed households with children under 18 in Santa Monica fell by more than 27% under rent control, despite an increase in such households in Los Angeles County as a whole (*id.*);[1]

- Santa Monica suffered a decline in its elderly population under rent control. This decrease was especially remarkable because the elderly population of Los Angeles County rose by more than 15% over the same decade. The elderly population increased over this period in every comparable southern California city without rent control. *Id.*

SMB asserted, on the basis of these factual claims, that the Rent Board's denial of its application for a fair rate of return on its capital investment bore no close nexus to the alleviation of any public harm that might result from the unregulated use and enjoyment of its property. Not only did the City's application of the rent ordinance do nothing to mitigate the effects of "a growing shortage of housing units" by making affordable housing more available to "the poor, minorities, students, young families and senior citizens," it actually made conditions worse. Thus, SMB claimed, the application of the Rent Control Law to its property does not meet the "substantial advancement" test articulated by this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-37 (1987).

For all of the above reasons, SMB argued that the Rent Board's application of the Rent Control Law to its property

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[1] Los Angeles County includes the City of Santa Monica.

effected an uncompensated regulatory taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

D. The Trial Court Dismisses the Suit on the Grounds That a Regulatory Taking Challenge to the Application of a Rent Control Law Is Subject Only to "Rational Basis" Review

The Rent Board demurred to SMB's inverse condemnation cause of action, contending that the Board's application of the Rent Control Law is not required to substantially advance the law's objectives and that *Nollan's* heightened standard of review does not apply to a Takings Clause challenge to the application of rent regulations. Respondent Los Angeles Superior Court sustained the Rent Board's demurrer to SMB's inverse condemnation claim and dismissed this cause of action on the sole ground that the "rational basis" standard of review is supposedly applicable to this claim. An order sustaining the demurrer to the inverse condemnation cause of action, without leave to amend, was entered on October 20, 1995. App C-1.[2]

E. The California Court of Appeal Reverses, Holding That SMB Is Entitled to Present Evidence Showing That the Application of the Law Bears "No Relationship at All" to Its Stated Purpose

SMB filed a petition for a writ of mandate with the California Court of Appeal, seeking reversal of the order sustaining the Rent Board's demurrer. SMB's petition raised the federal constitutional issue of whether *Nollan's* "substantial advancement" analysis is applicable to a regulatory taking challenge to the application of a rent control law.

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[2] SMB's procedurally required administrative mandamus petition remains unheard. As was recognized by the court below, this petition has no bearing on the trial court's final determination of SMB's federal claim for just compensation under the Fifth Amendment. App. A-10-11 n.2.

SMB's petition was granted and the appellate panel unanimously reversed Respondent Superior Court. The court of appeal held that whether continued application of the ordinance to SMB's property constituted a compensable taking was a fact-intensive inquiry that could not be resolved on demurrer. App. B-2. The court of appeal also recognized that *Nollan* expressly rejected the application of the rational basis test in regulatory taking cases, and affirmed the applicability of *Nollan's* "substantial advancement" standard to the case at bar. App. B-13-15. Finally, the appellate panel noted that if SMB can prove its allegations at trial, then the City's application of the Rent Control Law

> ***has no relationship (nexus) at all to its stated purpose***. Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose.

App. B-16 (emphasis added).

F. A Sharply Divided California Supreme Court Reverses, Holding That Rental Property Owners Can Be Singled out to Bear Special Burdens in the Name of Providing Public Benefits to the Poor, Minorities, and Other Groups, Even If the Program in Question (Rent Control) Fails to Advance Those Objectives

The California Supreme Court granted the Rent Board's petition for review and reversed the court of appeal, reinstating the order of the Respondent Superior Court. A narrow 4-3 majority held that *Nollan's* "substantial advancement" test and heightened standard of review are not available to property owners who allege their property has been taken by the application of a rent control law. Instead, the application of such laws to a particular property will be upheld against taking claims in California so long as reviewing courts can imagine any rational basis for the adoption of the law. App. A-14-16; A-21-22.

Three justices filed separate strong dissents from this holding, while one of the majority justices filed a concurrence asking for this Court to provide guidance on this important question.

Persistently mischaracterizing SMB's inverse condemnation claim as an attempt to "invalidate" or "repeal" the Rent Control Law, the majority below held that *Nollan's* substantial advancement standard is inapplicable to as-applied regulatory taking challenges to rent regulations. Instead, such challenges may only be maintained if the landowner claims that the government action "constitutes an arbitrary regulation of property rights." App. A-14. The court then engaged in a protracted exercise of *imagining* possible legitimate objectives for the Rent Control Law, demonstrating to its own satisfaction that the enactment of the law in 1979 was not arbitrary. App. A-20-21. Finally, the court suggested that the Rent Control Law should be presumed to substantially advance legitimate state interests so long as it benefits any tenant, regardless of the rationale for burdening property owners, and regardless of any social harms caused by the application of the law. App. A-22. On the basis of this analysis, the court below reversed the appellate court's opinion and dismissed SMB's complaint.

1. Justice Kennard's Concurrence Seeks Guidance from this Court

Although joining with the majority in ruling that heightened ends-means scrutiny should not be applied in the context of rent control, Justice Kennard recognized the unsettled state of this vital federal constitutional issue:

> [I]n the past 20 years the United States Supreme Court has adopted the rule that government regulation of property is a taking if it fails to substantially advance a legitimate state interest. . . . Outside the *Nollan/Dolan* context, the United States Supreme Court has not yet had occasion to define how closely

> ends and means must be related for a government action to avoid being a taking.

App. A-29, A-31 (Kennard, J., concurring). Justice Kennard then took the unusual step of directly appealing to this Court to review a decision in which she concurred!

> Outside the *Nollan/Dolan* context, should a means-end test be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence? Only the high court can resolve this question and, given the importance of this area of the law, ***I respectfully suggest that it do so when the opportunity next arises.***

App. A-38 (Kennard, J., concurring) (emphasis added).

2. Justice Baxter's Dissent Highlights the Majority's Failure to Extend Adequate Protection to Rights Guaranteed Under the Federal Constitution

In a thoughtful and comprehensive dissent, Justice Baxter dissected the majority opinion and demonstrated its fundamental conflict with this Court's protections of individual rights under the Takings Clause. The constitutional safeguard of close judicial scrutiny, he noted, is *especially* vital in evaluating the application of rent regulations:

> The analytical focus in assessing whether rent control constitutes a taking for which the takings clause mandates just compensation ***must be directed to the means by which rent control accomplishes its purpose.*** Rent control differs from and cannot be equated to other forms of price control because it encroaches on property rights in ways that price control does not. The Santa Monica rent control ordinance takes from the property owner the right to charge market rent for the owner's property and by so

> doing compels the owner to subsidize the tenant. Price control creates no comparable direct transfer of a property interest to a third person. The ordinance in question depresses the value of the rent-controlled property. Unlike property used to manufacture price-controlled items, rental housing cannot easily be used for other purposes and the Santa Monica ordinance severely limits the ability of the owner to go out of the rental housing business. Finally, the ordinance transfers to the tenant the right to occupy the property for an indefinite period. Again, none of this is true of other forms of price control. Thus we cannot assume that decisions upholding other forms of price control are authority for rejecting a takings clause challenge to a rent control ordinance.

App. A-56-57 (Baxter, J., dissenting) (emphasis added).

Reviewing this Court's decisions in the fields of rent control and regulatory takings, Justice Baxter noted:

> A claim based on the theory that just compensation is due because a rent control ordinance has not substantially advanced the legislative purpose advanced in justification of the resulting restriction of property owner's rights is one of first impression in this court. It is not novel, however. The Supreme Court recognized that an owner of rent-controlled property may offer evidence to demonstrate that the circumstances which once justified imposition of rent control no longer do so in *Chastleton Corp. v. Sinclair*, 264 U.S. 543 [(1924)].

App. A-71 (Baxter, J., dissenting).

Finally, unlike the majority, Justice Baxter perceived the key constitutional distinction between a *facial* challenge to the legitimacy of a legislative enactment, and allegations such as

SMB's, questioning whether the *application* of the law in fact advances its legitimate police power objectives:

> Although whether on its face this ordinance exceeds the permissible scope of the police power could be resolved by the court without taking evidence, the question posed by plaintiff in the complaint is whether over time the ordinance has substantially advanced the legislative purpose. This question cannot be decided on demurrer. ***If plaintiff can prove that the rent control ordinance has not substantially advanced its purpose, or that application of the ordinance to its property does not substantially advance the purpose, the "compensable taking" element of a cause of action for inverse condemnation would be established.*** This is true notwithstanding that the City may be able to show that there was a rational basis for the law when it was adopted.

App. A-50 (Baxter, J. dissenting) (emphasis added).

3. Justice Chin's Dissent Scores the Majority for Trying to "Alchemize" this Court's "Substantial Advancement" Test for Regulatory Takings into a Deferential Due Process Standard of Review

In his separate dissent, Justice Chin recognized that the majority had interpreted *Nollan's* "substantial advancement" test in a way that left it indistinguishable from the deferential "rational basis" standard applicable to substantive due process claims:

> We as judges write judicial opinions and articulate legal standards because we believe that words, though imperfect, have the power to convey objective meaning. And if words have that power, then a requirement that a law "'substantially advance'

> the 'legitimate state interest' sought to be achieved" is different from a requirement that a law not be "arbitrary," and, of course, it is different from a requirement that a law have a "rational basis." Nevertheless, the majority grafts these deferential due process standards onto the substantially advance standard.

App. A-91 (Chin, J., dissenting) (citation to *Nollan* omitted). By attempting to "alchemize" this Court's *Nollan* doctrine into a deferential substantive due process standard of review, Justice Chin objected, the majority rendered this Court's substantial advancement test "a mere vacuous shell." App. A-89, 91.

4. Justice Brown's Dissent Asks This Court to Address the Issue of the Applicability of *Nollan* to Regulatory Taking Challenges of This Kind

In the third dissenting opinion below, Justice Brown reproved the majority for evading the "substantial advancement" test mandated by this Court in *Nollan*. Like the New York Court of Appeals,[3] Justice Brown saw the issue as one of minimum constitutional standards established by this Court, which state courts lack authority to diminish under the Supremacy Clause:

> Instead of attempting to measure the actual fit between [the application of] the city's rent ceiling and its fact-based justifications for the ordinance, the majority applies an enfeebled rational basis standard, and contents itself with supposing that some generalized conception of the public good might be promoted by the means chosen. But a laissez-faire

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[3] *See Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995) (*Nollan* and other decisions "establish a constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause").

> attitude toward takings claims is no longer good enough. The United States Supreme Court's precedents appear to establish a minimal level of protection which this court lacks authority to diminish. . . . ***If such measures are capable of withstanding a Nollan-inspired takings clause analysis, the high court ought to tell us so, preferably sooner rather than later.***

App. A-110-11, A-113 (Brown, J., dissenting) (emphasis added).

In sum, three justices of the California Supreme Court strongly dissented from the opinion below, and a fourth expressly looked to this Court for guidance. Petitioner Santa Monica Beach, Ltd., now respectfully asks this Court to issue a writ of certiorari and provide much-needed direction on this important question of federal constitutional law.

REASONS FOR GRANTING THE PETITION

In the decision below, the California Supreme Court ruled that property owners in that state may not present evidence to show that the application of rent regulations to their property fails to substantially advance legitimate state interests. This violates the fundamental notion of distributive fairness underlying the Fifth Amendment's Takings Clause. Owners of rental property are singled out to bear special burdens to provide public benefits to the poor, minorities, and other disadvantaged tenant groups, yet are not allowed to present proof that the application of the law in question fails to accomplish its objectives.

This is the latest in a series of decisions in which the California Supreme Court has systematically diminished the federal constitutional rights of its citizens far below the minimum threshold established by this Court's Takings Clause

jurisprudence.[4] As a dissenting justice in the proceeding below noted, the decision of the majority was based on "the conviction that more than a decade of reinvigorated takings jurisprudence has changed nothing." App. A-98 (Brown, J., dissenting). If the decision below is allowed to stand, this Court's landmark decision in *Nollan v. California Coastal Commission* will be limited to its facts for future California litigants. *Nollan* will thus join *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* and *Lucas v. South Carolina Coastal Council*, as important decisions of this Court whose protections of federal constitutional rights have been eviscerated by the court below.

In refusing to apply *Nollan's* substantial advancement analysis to SMB's regulatory taking claim the California Supreme Court also comes into conflict with decisions of the Ninth Circuit Court of Appeals and the highest state court of New York on federal Takings Clause issues. The majority opinion below stands in direct opposition to *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 168 (1998), and to the opinions of the New York Court of Appeals in *Seawall Associates v. City of New York*, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989), and *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

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[4] *See Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851, 16 Cal. 4th 761, 782 (1998) (contrary to this Court's holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), just compensation for a regulatory taking not available in California if a due process remedy is "available and adequate"); *Landgate, Inc. v. California Coastal Commission*, 953 P.2d 1188, 17 Cal. 4th 1006 (1998) (contrary to this Court's holdings in *First English* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), just compensation for temporary deprivation of all economically viable use not available in California for time spent in litigation against unconstitutional imposition of regulatory authority).

This Court should grant certiorari in order to resolve the conflicts between the California Supreme Court and this Court, the Ninth Circuit, and the highest state court of New York, on important federal constitutional issues arising under the Takings Clause.

I

THE FUNDAMENTAL NOTION OF FAIRNESS UNDERLYING THE TAKINGS CLAUSE IS VIOLATED WHEN LANDOWNERS ARE SINGLED OUT TO BEAR THE FULL COSTS OF GENERAL PUBLIC BENEFITS YET ARE NOT ALLOWED TO PROVE THAT THE APPLICATION OF THE REGULATIONS IN QUESTION FAILS TO DELIVER THOSE BENEFITS

The essence of the Fifth Amendment's Takings Clause[5] is an equitable inquiry. The purpose of the clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Santa Monica's Rent Control Law singles out the owners of residential rental housing to bear the full costs of making below-market (in effect, privately subsidized) accommodations available to "the poor, minorities, students, young families, and senior citizens." App. A-2.

Petitioner does not dispute that preserving and increasing the supply of affordable housing available to these disadvantaged population groups is a legitimate objective of government. As a Justice of this Court has noted in a similar context,

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[5] The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This federal prohibition was extended to the states through the Fourteenth Amendment. *Chicago, Burlington, & Quincy Railroad Company v. City of Chicago*, 166 U.S. 226 (1897).

> [t]he traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities--a problem caused by the society at large--has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," this is the only manner that our Constitution permits. The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals.

Pennell v. City of San Jose, 485 U.S. 1, 21-22 (1988) (Scalia, J., concurring in part and dissenting in part) (citation to *Armstrong* omitted). The issue in this lawsuit, however, is not whether the costs of providing public benefits to disadvantaged tenants may be disproportionately concentrated on the owners of rental housing. The court below has gone farther than this, and has upheld the application of such a cost-shifting regulation even while acknowledging that the application of the law not only fails to produce the public benefits that justified its adoption, but actually exacerbates the problems it was adopted to relieve!

In short, the decision below holds that rental property owners can be singled out to bear special financial burdens in the name of providing general public benefits--even if no such benefits are in fact provided![6] This is an especially egregious example of forcing a small group of individuals to bear the full

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[6] "In effect, the majority concedes the ordinance does not further its stated goal of 'providing affordable housing for the poor, the elderly and young families.'" App. A-111 (Brown, J., dissenting).

costs of burdens that, in fairness and justice, should be borne by the public as a whole.

> The Santa Monica rent control ordinance forces owners of rental property to bear what should be a public burden. It thus creates a taking of property from any owner of rental property to which it is applied, a taking for which the takings clause mandates just compensation.

App. A-88 (Baxter, J., dissenting).

II

UNDER THE "SUBSTANTIAL ADVANCEMENT" STANDARD ENUNCIATED BY THIS COURT IN *NOLLAN*, SMB IS ENTITLED TO PRESENT EVIDENCE THAT THE APPLICATION OF THE RENT CONTROL LAW TO ITS PROPERTY BEARS "NO RELATION AT ALL" TO ACCOMPLISHING THE LAW'S LEGITIMATE OBJECTIVES

The facts alleged in SMB's complaint (which must be deemed proven for purposes of this appeal)[7] show that, in the words of the Court of Appeal, the application of Santa Monica's Rent Control Law in this case "has no relationship (nexus) at all to its stated purpose." App. B-16. Nevertheless, the California Supreme Court concluded these facts did not state a claim for a regulatory taking under this Court's requirement that there must be "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992).

This amounts to a repudiation of this Court's modern regulatory taking doctrine by the highest state court of California. This was recognized even by one of the justices in

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[7] App. A-44-45 ("In ruling on the sufficiency of a complaint to withstand a demurrer, i.e., to state a cause of action, the court assumes the truth of all well-pleaded allegations.").

the majority below, prompting a plea for this Court to clarify the applicability of *Nollan's* substantial advancement standard outside the factual context of a permit conditioning scheme:

> [A]s the differing positions held by members of this court in this case show, there are grounds for reasonable debate as to the meaning of that test in just compensation law outside the *Nollan/Dolan* context. Does it require only a rational relationship between the regulation and its purpose? Or a closer connection between means and ends, adapted from the *Nollan/Dolan* test? Or some other degree of connection between means and ends? I urge the high court to resolve this uncertainty.

App. A-36-37 (Kennard, J. concurring). Petitioner SMB respectfully concurs with Justice Kennard and with the three dissenting justices below, in asking this Court to grant the petition for certiorari to resolve this issue.

A. *Nollan* Requires Meaningful Means-Ends Scrutiny When the Application of Land Use Regulations Is Challenged Under the Takings Clause

Outside the state courts of California, it is generally recognized that this Court in *Nollan* "expressly endorsed a form of semi-strict or heightened judicial scrutiny of regulatory means-ends relationships." Frank Michelman, *Takings, 1987*, 88 Columb. L. Rev. 1600, 1607-08 (1988). The language of the decision does not suggest that this Court intended to limit the *Nollan* analysis to the facts of that case. Indeed, *Nollan's* Footnote 3 appears to constitute an across-the-board rejection of the "rational basis" standard in regulatory taking cases:

> We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have*

> *decided*' the measure adopted might achieve the State's objective."

483 U.S. at 835 n.3 (citations omitted).

Commentators have recognized that the *Nollan* analysis is especially important in evaluating as-applied regulatory taking challenges:

> As the Court noted in *Nollan*, the nexus required must connect not only regulatory means and ends, but also the need for a ***particular regulatory imposition on a particular landowner.***

Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 Harv. J. L. & Pub. Pol'y 147, 155 (1995) (emphasis added, footnote omitted). This focus on the effect of the *application* of land use regulations was reemphasized in *Dolan v. City of Tigard*, 512 U.S. 374 (1994):

> The decision in *Dolan v. City of Tigard* supplements the *Nollan* nexus between regulation and legitimate public purpose with a second-tier inquiry to determine "rough proportionality" between the regulatory program ***and its specific application***.

Daniel J. Curtin, Jr., and Jonathan M. Davidson, *Life After Dolan: Review of the Cases*, 27 Urb. Law. 874, 874 (1995) (emphasis added). In effect, this implies a requirement of both an ends-means and a cause-effect nexus:

> In [*Nollan*], the Court articulated two different understandings of the relationship required for a regulation to "substantially advance a legitimate state interest" in takings law. The Court described the "substantially advance" test as one that examines whether the regulation actually achieves its stated purpose: a means-end test. Additionally, the Court described the "substantially advance" test as one that examines the proportionate relationship between the amount of

> public harm caused by the owner and the regulatory burden imposed: a cause-effect test.

Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 Nw. U. L. Rev. 591, 602 (1998) (footnotes omitted).

Establishing the presence or absence of such a nexus is, of course, a fact-intensive inquiry requiring the examination and weighing of evidence at trial. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). It cannot under any circumstances be disposed of via demurrer. Plaintiffs such as SMB must be allowed to put on evidence showing that the application of restrictive land use regulations fails to meet *Nollan's* substantial advancement requirement.

B. By Reducing *Nollan's* Substantial Advancement Requirement to an Especially Deferential Form of Rational Basis Review, the California Supreme Court Has Drained the Substance from This Court's Reinvigorated Regulatory Taking Jurisprudence

Despite this Court's clear language in *Nollan*, and the application of *Nollan's* ends-means inquiry in a rent control context by this Court and by other state and federal courts, the court below instead chose to employ an extremely deferential form of rational basis review. In evaluating the takings impact of the application of rent regulations in California, the substantial advancement standard now means the aggrieved landowner "bears the burden of proving that the regulation 'constitutes an arbitrary regulation of property rights.'" App. A-14. Ultimately, the California Supreme Court found *Nollan's* nexus requirement satisfied because the City of Santa Monica desired to control SMB's property, and the application of the Rent Control Law enabled it to accomplish this objective. App. A-22.

As Justice Brown noted in dissent, this collapsing of "substantial advancement" into "rational basis" reflects the

majority's "conviction that more than a decade of reinvigorated takings jurisprudence has changed nothing." App. A-98. Until the California Supreme Court addressed this issue, it had been understood that

> *Nollan* established that a meaningful, heightened, nexus scrutiny of governmental regulation of property rights is, henceforth[,] the governing norm.

Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 Neb. L. Rev. 186, 211 (1991). Even authorities clearly hostile to the exercise of private property rights agreed:

> Between the demise of *Lochner* and [the *Nollan*] decision, the Court's review of the rationality of state exercise of police power was based upon a presumption of rationality. . . . [In *Nollan*] Justice Scalia disregards this time-honored deference to legislative decision making and replaces it with a test that requires greater judicial scrutiny.

Cotton C. Harness, III, *Lucas v. South Carolina Coastal Council: Its Historic Context and Shifting Constitutional Principles*, 10 Pace Envt'l. L. Rev. 5, 17 (1992). After the decision below, however, *Nollan's* requirement of heightened ends-means review is a dead letter in California. If this standard can be satisfied by the application of any regulation that possesses a conceivably rational basis for its enactment, there is no longer any distinction between the standards applicable to regulatory takings and "those applied to due process or equal protection claims." *Nollan*, 483 U.S. at 835 n.3. It is as if this Court's *Nollan* decision never existed.

C. Controlling the Use of Land for Its Own Sake--With No Underlying Rationale Except That of Redistributional Politics--Does Not Satisfy the Meaningful Ends-Means Nexus Required by *Nollan*

Evaluating the application of a land use regulation under the substantial advancement test

> requires a judicial assessment based on the facts of each owner's use, the legitimacy and importance of the purposes embodied in the regulation, the predicted effects of the regulation, and the appropriateness of the means chosen.

McUsic, 92 Nw. U. L. Rev. at 655. In stark contrast, the majority below claim to have met this standard by the invocation of a tautology: the Rent Control Law states that its purpose is to control rents, which SMB does not deny it has accomplished. App. A-19-22. This, under the deferential approach taken by the majority below, is sufficient to satisfy the requirement that the application of the law to SMB substantially advances legitimate state interests. *Id.*

This Court has already considered and rejected such a tautological rationale for rent control in *Chastleton Corporation v. Sinclair*, 264 U.S. 543 (1924). There, Justice Holmes acknowledged that the mere desire to control rents for its own sake, without more, "is not in itself a justification" for the application of rent control to the petitioner's property. *Id.* at 548. However, the majority below found themselves no more bound by *Chastleton Corporation* than by *Nollan*, dismissing this Court's protection of Fifth Amendment rights as "'a *Lochner*-era case the validity of which is questionable at best.'" App. A-23 (footnote and citation omitted). Despite the urging of the dissenting justices, the majority were apparently oblivious to the distinction between the substantive due process analysis of *Lochner v. New York*, 198 U.S. 45 (1905), and the regulatory

taking standards applicable to *Chastleton Corporation*, *Nollan*, and the case at bar.

Ironically, the majority opinion below in fact seems to be modeled on Justice Brennan's ***dissent*** in *Nollan*.[8] In that case, the dissent argued that the substantial advancement test was in fact satisfied, since the objective of the regulation in question was to convert private beaches into public beaches, and its application to the Nollans did just that. *Nollan*, 483 U.S. at 850-53 (Brennan, J. dissenting). Similarly, the majority below are satisfied to find an essential nexus between the desire of Santa Monica's dominant political faction to transfer private housing resources to itself, and the application of a law that (the court assumes) does just that.

The New York Court of Appeals, vigorously applying *Nollan* to a rent control scheme in that state, has put the point well:

> The sharply focused legal question under the controlling precedential and analytical principles may be reduced simply to whether the legislation is supported by a substantial State interest and close nexus. . . . The Constitution forbids State action by fiat, no matter the economic equation.

Manocherian v. Lenox Hill Hospital, 643 N.E.2d at 486. The court below, in contrast, would rationalize regulation by fiat as somehow consistent with this Court's substantial advancement

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[8] This is the second time in less than a year that the California Supreme Court has apparently adopted the rationale of a dissent from a regulatory taking decision of this Court. *See Landgate, Inc. v. California Coastal Commission*, 17 Cal. 4th 1006 (adopting the position Justice Stevens advanced in his dissenting opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 334, that litigation over the validity of a land use restriction is simply a "normal delay" in the permit approval process and, therefore, cannot give rise to a temporary taking).

standard. Allowing this decision to stand would, as Justice Chin observed, render this Court's regulatory taking formulations "a mere vacuous shell." App. A-91 (Chin, dissenting).

III

THE RULING BELOW, THAT THIS COURT'S "SUBSTANTIAL ADVANCEMENT" STANDARD IS INAPPLICABLE TO RENT CONTROL, CONFLICTS WITH THE NINTH CIRCUIT'S DECISION IN *RICHARDSON v. CITY AND COUNTY OF HONOLULU*

The central holding of the court below is that this Court's "substantial advancement" test, as articulated in *Nollan*, "is applied differently depending on the type of government action under consideration," App. A-14, and collapses to a rational basis standard when applied to rent control. App. A-15-18. This doctrine directly conflicts with *Richardson v. City and County of Honolulu*, 124 F.3d 1150, a recent decision of the Ninth Circuit Court of Appeals.

In *Richardson*, the Ninth Circuit applied *Nollan* to strike down a Honolulu rent control ordinance for failure to substantially advance its stated objectives. The federal appellate panel based its analysis in part on this Court's admonition that a regulatory taking challenge to a rent control law may turn on "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." *Id.* at 1165 (quoting *Yee v. City of Escondido*, 503 U.S. at 530 (citing *Nollan*)).

The plaintiff in *Richardson*, like the present Petitioner, raised a *Nollan*-based challenge,

> contend[ing] that Ordinance 91-96 fails to substantially further its stated public purposes and, therefore, constitutes a regulatory taking.

Id. at 1164. The Ninth Circuit agreed. Closely scrutinizing the Honolulu measure's objectives and effects, the federal panel struck down Ordinance 91-96 for failing to substantially advance its admittedly legitimate objectives:

> Land use regulations do influence the value of property, but to be constitutional, they must do so in a manner that substantially furthers a legitimate government interest. Ordinance 91-96 does not do this. It regulates the use of the lessors' property interests in a manner that does not substantially further the goal of creating affordable housing. . . . The Ordinance thus effects a regulatory taking.

Id. at 1165-66.

Because the Ninth Circuit's jurisdiction includes California, rental property owners in that state now face radically conflicting levels of protection under the Takings Clause, depending on whether they pursue their claims in state or federal court. This Court should grant the present petition and resolve the conflict between the California Supreme Court and the Ninth Circuit Court of Appeals on this important question of federal constitutional law.

IV

THE DECISION BELOW CONTRIBUTES TO A SYSTEMIC CONFLICT BETWEEN THE HIGHEST STATE COURTS OF CALIFORNIA AND NEW YORK ON THE PROPER STANDARD OF REVIEW FOR FEDERAL CONSTITUTIONAL CLAIMS ARISING UNDER THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT

In addition to conflicting with the holdings of this Court and the Ninth Circuit, the decision below contributes to a long-standing conflict between the decisions of the highest state courts of California and New York on federal takings issues.

This conflict between the courts of the most populous states of the Union on important federal questions can only be resolved by a timely and forceful ruling by this Court.

In contrast to the apparent dedication of the majority below to evade this Court's teaching in *Nollan* and *Dolan*, the highest court of the State of New York has applied the "substantial advancement" analysis set forth in these cases to strike down overzealous regulation of private rental property. In *Seawall Associates v. City of New York*, 542 N.E. 2d 1059, the New York Court of Appeals overturned Local Law 9, a regulation that prohibited the conversion or demolition of single room occupancy (SRO) residential hotels. The stated purpose of the ordinance was to alleviate homelessness by increasing the availability of SRO housing. A group of owners sued the city, arguing that, *inter alia*, Local Law 9 violated the Takings Clause by failing to substantially advance its admittedly legitimate objectives.

Partly because of evidence that Local Law 9 could not significantly advance its stated goal of relieving homelessness, the state high court found that "the nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural." 542 N.E.2d at 1069. The court expressly recognized and applied "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as required by *Nollan*. *Id.* at 1068.

Five years after *Seawall*, the New York Court of Appeals applied this Court's *Dolan* decision to find a regulatory taking in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479. In striking down a rent control measure under the Takings Clause, the New York panel observed that *Nollan* and *Dolan* "establish a ***constitutional minimum floor of protection which this Court lacks authority to diminish under the supremacy clause***." *Id.* at 482 (emphasis added). Applying the ends-means scrutiny required by this Court, the Court of Appeals found that the

challenged measure effected a taking because it "suffers a fatal defect by not substantially advancing a closely and legitimately connected State interest" as required by *Nollan* and *Dolan*. *Id.* at 480.

In sharp contrast to the New York court's regard for the Supremacy Clause, the California Supreme Court in the majority opinion below effectively limited this Court's *Nollan* and *Dolan* rulings to their facts. By declaring, "the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration," App A-14, the Court below drained any content from this Court's protections of Fifth Amendment Rights. As Justice Chin aptly noted in dissent, the majority's recharacterization of the substantial advancement test as the equivalent of a rational basis standard "renders it a mere vacuous shell." App. A-91 (Chin, J., dissenting).

By adopting a stance of virtually total deference to the regulatory enactments of local political factions, the court below has come into direct conflict with the rigorous application of *Nollan* and *Dolan* by the New York Court of Appeals. Instead of joining New York in applying the close ends-means scrutiny mandated by this Court in *Nollan* and *Dolan*, California has turned back the clock to pre-*Nollan* jurisprudence, garbling the substantial advancement standard so as to arrive at a more deferential test for regulatory takings than this Court has ever accepted. This Court should grant certiorari in order to resolve this conflict between the two largest states in the Nation, as well as the split between the state and federal courts in California, on important federal questions arising under the Takings Clause.

CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be GRANTED.

DATED: March, 1999.

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